

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**GIRARDO SABAS**

Claimant

VS.

**DONDLINGER & SONS CONSTRUCTION CO., INC.**

Respondent

AND

**BUILDERS ASSOCIATION SELF-INSURERS FUND**

Insurance Carrier

Docket No. 184,888

**ORDER**

Respondent appealed the Award dated April 21, 1997, entered by Administrative Law Judge John D. Clark. On September 24, 1997, the Appeals Board heard oral argument.

**APPEARANCES**

Michael L. Snider of Wichita, Kansas, appeared for the claimant. Wade A. Dorothy of Lenexa, Kansas, appeared for the respondent.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. At oral argument before the Appeals Board, the parties agreed the medical records attached to the preliminary hearing transcript were not part of the record to be considered for final award purposes.

**ISSUES**

The Administrative Law Judge found that claimant sustained both physical and psychological injury that resulted in a 53 percent whole body functional impairment. Also, the Judge found claimant's average weekly wage was \$400.06. The parties raise the following issues on this appeal:

- (1) What is the average weekly wage? Claimant contends the average weekly wage should be computed based upon a six-day workweek.
- (2) What is the nature and extent of injury and disability? The respondent contends claimant's benefits should be limited to a 3 percent whole body functional impairment rating that was provided addressing the orthopedic injuries only. Respondent denies that claimant sustained any permanent brain or neurological injury. In the alternative, respondent contends claimant failed to prove the functional impairment for the alleged brain and psychological injuries.

#### **FINDINGS OF FACT**

After reviewing the entire record, the Appeals Board finds as follows:

- (1) The parties stipulated that claimant, Girardo Sabas, sustained personal injury by accident arising out of and in the course of his employment with Dondlinger & Sons Construction Co., Inc., on November 16, 1993. On that date Mr. Sabas was working on a scaffold and fell approximately ten feet onto a concrete floor striking his head and shoulders. Dondlinger and its insurance carrier concede Mr. Sabas sustained a 3 percent whole body functional impairment for the orthopedic injuries sustained in the fall. But they deny he sustained any other permanent injury.
- (2) Mr. Sabas regularly worked or was expected to work for Dondlinger eight hours per day, six days per week. On the date of accident he was earning \$7.50 per hour for a daily rate of \$60 and a weekly rate of \$360.
- (3) The wage statement introduced at the regular hearing indicates that Mr. Sabas was paid a total of \$785.64 over and above the \$360 weekly rate during the 11-week period shown on the document that he worked before the date of accident. Therefore, Mr. Sabas's average weekly overtime is \$71.42.
- (4) After missing several days from work immediately after the fall, Mr. Sabas returned to work as a construction laborer for Dondlinger. He, however, contends that he has experienced personality and behavioral changes, severe headaches, and problems with his memory as a result of the closed-head injury he sustained in the accident along with the orthopedic injuries he sustained to his shoulders, neck, and back.
- (5) Board-certified neurologist Dilawer H. Abbas, M.D., saw Mr. Sabas on December 29, 1993, and January 12, 1994. He diagnosed post-concussion syndrome with behavioral changes and severe post-concussion headaches. He did not believe Mr. Sabas

had any permanent brain injury and thought he would gradually improve over time. In formulating his opinions, the doctor considered a normal CT scan and normal EEG.

(6) Board-certified orthopedic surgeon Robert L. Eyster, M.D., periodically treated Mr. Sabas for neck, back, and shoulder pain between March 30, 1994, and March 29, 1995. He believes Mr. Sabas has a 3 percent whole body functional impairment due to chronic cervical strain. He did not note post-concussion symptoms significant enough for a neuropsychological referral.

(7) At the Administrative Law Judge's request, Mr. Sabas saw neuropsychologist Mitchel A. Woltersdorf, Ph.D., in November 1995 for an evaluation. This doctor believes Mr. Sabas sustained a mild closed-head injury that resulted in significant problems with attention, problem solving, and depression. Using both the third and fourth editions of the AMA Guides to the Evaluation of Permanent Impairment, the doctor found Mr. Sabas had a 50 percent permanent impairment.

(8) In April 1996, board-certified psychiatrist Patrick Lawrence Hughes, M.D., interviewed and evaluated Mr. Sabas at the insurance carrier's request. Based upon a normal CT scan and EEG, this doctor believes Mr. Sabas sustained a concussion in the November 1993 fall that has completely resolved. In addition to disagreeing with Dr. Woltersdorf's conclusion that Mr. Sabas has significant impairment, he also disagrees with the interpretation that Dr. Woltersdorf gave to his test results. Dr. Hughes does not believe Mr. Sabas sustained any permanent impairment because of the alleged closed-head injury. He also testified that Dr. Woltersdorf did not utilize the proper procedure set forth in the AMA Guides to rate Mr. Sabas.

(9) Psychiatrist Abdul Wadud, M.D., saw Mr. Sabas at his attorney's request in September 1996 on two occasions. From his review of various medical records, including those of Drs. Woltersdorf and Hughes, he diagnosed post-concussion syndrome, depression, and post-traumatic stress disorder. He believes Mr. Sabas's irritability and mood changes are consistent with an injury to the frontal and temporal brain lobes. And he believes Mr. Sabas needs psychotherapy to cope with his anger and depression. He disagrees with Dr. Hughes' opinion that Mr. Sabas may be a malingerer. Dr. Wadud did not attempt to quantify or rate Mr. Sabas's permanent impairment.

(10) Board-certified orthopedic surgeon Edward Prosic, M.D., examined and evaluated Mr. Sabas in April 1994. He found Mr. Sabas had a 15 percent whole body functional impairment for the orthopedic injuries only. When he combined his 15 percent rating with Dr. Woltersdorf's 50 percent impairment rating, he found Mr. Sabas had a 58 percent whole body impairment rating according to the AMA Guides.

(11) The Administrative Law Judge found Mr. Sabas sustained a 3 percent whole body functional impairment for the orthopedic injuries he sustained in the November 1993 fall. The Appeals Board agrees with that finding.

(12) The Appeals Board also finds Mr. Sabas sustained a closed-head injury in that accident. But after considering the testimony of Drs. Woltersdorf and Hughes, the Appeals Board is not persuaded Mr. Sabas has a 50 percent impairment due to the closed-head injury as it appears Dr. Woltersdorf did not formulate the rating in the proper manner. Therefore, Mr. Sabas's functional impairment for the closed-head injury falls somewhere between the 0 percent indicated by Dr. Hughes and the 50 percent provided by Dr. Woltersdorf. Giving both opinions equal weight, the Appeals Board finds Mr. Sabas has a 25 percent functional impairment due to the closed-head injury.

(13) Combining the 25 percent functional impairment rating with the 3 percent functional impairment rating for the orthopedic injuries yields a 27 percent whole body functional impairment as indicated by the AMA Guides, Third Edition (Revised), as a result of the November 1993 accident.

(14) The Appeals Board adopts the findings set forth in the Award to the extent they are not inconsistent with the above.

#### **CONCLUSIONS OF LAW**

(1) Mr. Sabas regularly worked eight hours per day, six days per week. Because he was earning \$7.50 per hour on the date of accident, his daily wage rate is \$60 and his weekly wage rate is \$360. Adding the \$71.42 in average overtime to the weekly rate yields a \$431.42 average weekly wage. K.S.A. 44-511.

(2) Because his is an "unscheduled" injury, Mr. Sabas's permanent partial general disability is the greater of his functional impairment rating or work disability. But workers who return to work after recovering from their injury to earn wages equal to 90 percent or more of their pre-injury average weekly wage are limited to permanent partial general disability benefits based upon their functional impairment rating. K.S.A. 44-510e. Here, Mr. Sabas continues to work for Dondlinger as a laborer and has neither requested nor attempted to prove a work disability.

Mr. Sabas is entitled to permanent partial general disability benefits based upon his 27 percent whole body functional impairment rating.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated April 21, 1997, entered by Administrative Law Judge John D. Clark should be modified to increase the average weekly wage to \$431.42 and reduce the permanent partial general disability rating from 53 percent to 27 percent.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Girardo Sabas, and against the respondent, Dondlinger & Sons Construction Co., Inc., and its insurance carrier, Builders Association Self-Insurers Fund, for an accidental injury which occurred November 16, 1993, and based upon an average weekly wage of \$431.42, for .29 weeks of temporary total disability compensation at the rate of \$287.63 per week or \$83.41, followed by 112.05 weeks at the rate of \$287.63 per week or \$32,228.94 for a 27% permanent partial general disability, making a total award of \$32,312.35, which is presently due and owing in one lump sum, less any amounts previously paid.

The remaining orders set forth in the Award are hereby adopted by the Appeals Board as its own to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael L. Snider, Wichita, KS  
Wade A. Dorothy, Lenexa, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director